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No. 88-1173

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM PERRY PENDLEY, ADMINISTRATOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below erred in applying the law of Virginia, the state where the accident occurred, to determine the government's liability in tort.

2. Whether the court of appeals erred in affirming the district court's grant of summary judgment to the United States on the ground that the United States is a statutory employer within the meaning of the Virginia Workers' Compensation Act, Va. Code § 65.1-29 (1987), and so is immune from suit.

3. Whether the district court abused its discretion by refusing petitioner's motion for sanctions after the government's motion for summary judgment was granted by the court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 856 F.2d 699. The orders of the district court (Pet. App. 7a, 8a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-6a) was entered on September 19, 1988. A petition for rehearing (Pet. App. 9a) was denied on October 14, 1988. The petition for a writ of certiorari was filed on January 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 19, 1985, Leon Cassutt was killed in a rocket propellant fire at the Atlantic Research Corporation's (Atlantic Research) Pine Ridge Plant in Gainesville, Virginia. Cassutt was an employee of the Aerospace Corporation (Aerospace), which was operating under a contract with the United States Air Force Space Division to provide engineering consulting and analysis with respect to work being done by Atlantic Research for the Air Force. Cassutt was acting within the scope of his employment, carrying out the activities Aerospace had contracted to perform, at the time he was killed. As its employee, Cassutt was supervised exclusively by Aerospace. Pet. App. 2a.

A separate contract between the Air Force and the Vought Corporation covered the work that Cassutt was to observe at the Pine Ridge Plant. Atlantic Research was a subcontractor for the Vought Corporation conducting the activities under its contract. Pet. App. 2a. The Air Force also contracted directly with Atlantic Research for research and development in rocket propellant bonding systems. Work performed under the latter contract led to the accident that killed Cassutt.[1] On September 19, 1985, an employee of Atlantic Research was attempting to cut solid rocket propellant when it ignited. Pet. 3. Cassutt was killed in the fire that followed. *Ibid.*

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[1] As the court of appeals found, all the contracts made by the United States here had numerous similarities. The Air Force did not have the right to hire or fire employees or supervise the daily operations, but did retain a right to oversight and inspection of the final product. Each contract contained a clause that held the contractors responsible for safety regardless of any government oversight. All the contracts required the contractors to obtain and maintain workers' compensation insurance, with the premiums to be reimbursed by the government as a cost of the contract. Pet. App. 2a.

2. Petitioner, the administrator of Cassutt's estate, brought a wrongful death suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, on February 25, 1987. Petitioner alleged that Cassutt's death was caused by the negligence of the United States, the Air Force, and the Defense Logistics Agency of the Department of Defense. Upon a motion for summary judgment by the United States made July 24, 1987, the district court dismissed the suit. It determined that it lacked jurisdiction over the case because the government was a "statutory employer" of Cassutt within the meaning of the Virginia Workers' Compensation Act, which limits employees to recovering workers' compensation, not tort damages, from their employers. See Va. Code §§ 65.1-29, 65.1-40 (1987)[2]; Pet. App. 7a. Petitioner also moved for sanctions, costs, and attorneys' fees against the government, arguing that the government should have advanced its statutory defense sooner. The court denied the motion. Pet. App. 8a.

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[2] Va. Code § 65.1-29 (1987) provides:

> When any person [owner] * * * undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person [subcontractor] * * * for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by him.

Statutory employees and employers are limited to settling disputes involving work injuries by Va. Code § 65.1-40 (1987), which provides:

> The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee * * * at common law or otherwise, on account of such injury, loss of service or death.

The court of appeals affirmed. Pet. App. 1a-6a. It ruled that Virginia law controlled the case, and then decided that the Air Force was an statutory employer within the meaning of Va. Code § 65.1-29 (1987), so that it was immune from tort suits under the exclusive remedy provisions of § 65.1-40. Pet. App. 3a-6a. The court of appeals also affirmed the district court's denial of sanctions, costs, and attorneys' fees. Pet. App. 6a n.4.

ARGUMENT

1. Petitioner claims (Pet. 18-25) that the Full Faith and Credit Clause (U.S. Const. Art. IV, § 1) requires that California law be applied here. He contends that California has a greater interest in this case than does Virginia, even though the accident occurred in Virginia, since Cassutt was a California resident working for a California corporation under a contract executed there. This proposition is mistaken.

Under the FTCA, any liability incurred by the government is determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The work was performed in Virginia, the injury occurred in Virginia, and the alleged tortious acts occurred in Virginia. As the court of appeals recognized (Pet. App. 3a n.3), "the proper law to apply is [therefore] the ' * * * law of the place where the act or omission occurred' "; that law is the Virginia Workers' Compensation Act.

Moreover, this Court has determined in a related context that the State where an injury occurs has interests that are "large and considerable" (*Carroll* v. *Lanza,* 349 U.S. 408, 413 (1955)) and has rejected the contention that the Full Faith and Credit Clause requires that State to "be a vassal to the home State." *Id.* at 412. Rather, this Court has ruled that the sovereignty preserved to every State

"precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 278 n.23 (1980) (quoting *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)); see also *id.* at 277-278 (describing balancing of States' interests performed by Court); 4 A. Larson, *The Law of Workmen's Compensation* § 88.12 at 16-139 (1988). In *Carroll, supra*, "[t]he principle that the Full Faith and Credit Clause does not require a State to subordinate its own compensation policies to those of another State" (*Thomas*, 448 U.S. at 279) led to the conclusion that Arkansas could open its courts to negligence suits despite the proscription of such suits under Missouri's workers' compensation law. Here, the principle means that the courts must respect Virginia's determination that statutory employers cannot be sued for negligence.[3]

In like situations, the Fourth Circuit has consistently applied the law of the State where the injury occurred. Thus, the panel here explicitly based its decision on *Garcia* v. *Pittsylvania County Service Auth.*, 845 F.2d 465 (4th Cir. 1988), in which the Fourth Circuit held that the law of Virginia controlled to bar the employee of a North Carolina independent contractor—an employee who was a

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[3] The application of Virginia law is not disturbed by an employee's election to receive compensation payments from another State, as petitioner appears to contend (Pet. 19-20). When a tort action against an employer or statutory employer is barred by the law of the State where the injury occurred, the employee may not remove that bar by accepting an award of compensation from another State. *Home Indemnity Co.* v. *J.H. Poladian*, 270 F.2d 156, 159-160 (4th Cir. 1959); see also *Jonathan Woodner Co.* v. *Mather*, 210 F.2d 868, 872 (D.C. Cir.), cert. denied, 348 U.S. 824 (1954).

resident of North Carolina, employed under a North Carolina contract and who had received North Carolina workers' compensation—from suing a Virginia county service authority for injuries sustained as the result of an accident occurring in Virginia. Pet. App. 3a. *Garcia* itself followed two earlier decisions in the Fourth Circuit, with which the current case is also consistent. In *Home Indemnity Co.* v. *J.H. Poladian,* 270 F.2d 156 (4th Cir. 1959), and in *McCann* v. *Newport News Shipbuilding & Drydock Co.,* 177 F. Supp. 909 (E.D. Va. 1959), the courts held that Virginia's workers' compensation law applied, establishing the right to workers' compensation as the exclusive remedy against a statutory employer and thus barring negligence suits against those employers.[4]

2. Petitioner contends (Pet. 8-13) that the court below erred in finding that the United States was Cassutt's statutory employer within the meaning of the Virginia Workers' Compensation Act, Va. Code § 65.1-29 (1987), and is thus

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[4] Petitioner appears to argue (Pet. 18 n.24) that, if they are not inconsistent with the court's holding here, *Garcia, Home Indemnity,* and *McCann* are at least inapplicable, because they concern defendants required to carry workers' compensation insurance in Virginia. The United States, petitioner notes (*ibid.*), could not be required to carry such insurance. The argument misses the mark. The United States is only liable for a tort "in the same manner and to the same extent as a private individual under like circumstances * * *." 28 U.S.C. 2674. "A private individual" acting as a statutory employer in Virginia is required to provide workers' compensation to his or her employees; the United States is presumed, for purposes of the analogy, liable to the same requirement. See, *e.g., Thomas* v. *Calavar,* 679 F.2d 416, 419 (5th Cir. 1982) (United States entitled to status of statutory employer and gains same immunity from suit in tort).

Further, the United States did in fact assure its employees compensation, since it contractually required workers' compensation insurance coverage for all employees of Aerospace and bore the expense of the insurance premiums. See note 1, *supra.*

immune from a negligence suit. His contention is without merit, and in any event, this question of state law is not one warranting review by this Court.

In Virginia, a party who contracts out work which is "a part of his trade, business or occupation" is the "statutory employer" of the person performing that work. Va. Code § 65.1-29 (1987). The Virginia Workers' Compensation Act therefore regulates the employment relation between the two parties; it dictates that workers' compensation is the exclusive remedy by which the employee can recover from the employer, and thus bars tort recovery against the employer. Va. Code § 65.1-40 (1987); see, *e.g.*, *Henderson* v. *Central Tel. Co.*, 233 Va. 377, 355 S.E.2d 596 (1987); *Smith* v. *Horn*, 232 Va. 302, 351 S.E.2d 14 (1986).

In order to determine whether a party is the "statutory employer" of another because he contracts out "a part of his trade, business or occupation," the Virginia courts generally examine whether the activity at issue "is, in that business, *normally* carried on through employees rather than independent contractors." *Shell Oil Co.* v. *Leftwich*, 212 Va. 715, 722, 187 S.E.2d 162, 167 (1972) (emphasis in original); see Pet. App. 4a. In addition, the Virginia Supreme Court has adopted a second test that it applies to both public utilities and government entities. *Henderson*, *supra*; *Williams* v. *Gresham Co.*, 201 Va. 457, 111 S.E.2d 498 (1959); *Anderson* v. *Construction Co.*, 201 Va. 266, 110 S.E.2d 396 (1959). Because "[i]t is not simply what [these employers] * * * do that defines their trade, business, or occupation[ ] * * * [but also] [w]hat they are supposed to do," the Virginia courts consider to be part of the "trade, business or occupation" of these employers the activities they are required to undertake by statute or regulation. *Henderson*, 233 Va. at 383, 355 S.E.2d at 599-600.

The Fourth Circuit in this case followed the reasoning in *Henderson* to find that the Air Force acted as a "statutory employer" here, because "[e]ach of the three contracts involved in this case were carried out pursuant to the function of the Air Force to develop space weapons systems, undoubtedly the 'trade, business or occupation' of the Air Force." Pet. App. 5a. Petitioner here objects (Pet. 9) on the grounds that "the Fourth Circuit erroneously applied to the United States Government * * * the test reserved for 'public utilities and government entities' and not the test reserved for private individuals or businesses." Contrary to petitioner's contention, however, the distinction is not one "required by the FTCA." *Ibid.* The telephone company at issue in *Henderson* was a privately owned (*i.e.*, not government-owned) public utility, as are many public utilities to which the *Henderson* test applies. See Pet. App. 5a-6a. The Fourth Circuit therefore correctly treated the government as a private party "under like circumstances" (28 U.S.C. 2674) when it decided that the closest analogy between the Air Force and the private sector under Virginia law was to a privately owned, statutorily regulated public utility. As the court of appeals noted (Pet. App. 5a), "[t]he analysis in *Henderson* was applied not to give the utility a special status, but because its peculiar circumstances required a different analysis in order to give the Worker's [*sic*] Compensation Act its full remedial purpose."[5]

[5] The court of appeals also based its conclusion here on the second rationale that founds the *Henderson* test, which applies independently of the public/private distinction. As the court here rephrased the *Henderson* court's reasoning, "if *Shell* were carried to its logical conclusion, a business which operated entirely through subcontractors would totally escape worker's compensation liability." Pet. App. 4a (citing *Henderson*, 233 Va. at 382-383, 355 S.E.2d at 599). The district court based its conclusion on the same rationale:

> Th[e] [*Henderson*] exception [to the *Shell Oil* test] doesn't arise because the entity is a government entity or because it is a public

Thus, petitioner's contention that the holding here conflicts with this Court's decisions in *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), and *Rayonier, Inc.* v. *United States,* 352 U.S. 315 (1957), is mistaken. In this case, the court of appeals applied an approach designed to clarify the largely factual inquiry whether in the particular circumstances the United States was an "employer," analogous to other private employers. This action is unlike that in *Indian Towing* and *Rayonier,* where the United States attempted to invoke, in its defense to an FTCA claim, a body of law that was inapplicable to private persons or entities.[6]

In any event, this Court normally "defer[s] to the construction of a state statute given it by the lower federal courts," on the grounds that those courts are generally

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> utility. That exception arises because this particular employer normally does most of its work through independent contractors, and those sort of employers ought not to be allowed to escape liability for compensation to injured workers by employing that device. That exception doesn't come about because you are dealing with a governmental entity. It comes about because of the type of employer you have.

C.A. App. 2373.

[6] Nor does the court of appeals' result conflict with the decision in *Vandergrift* v. *United States,* 500 F. Supp. 237 (E.D. Va. 1979), aff'd, 634 F.2d 628 (4th Cir. 1980). In *Vandergrift,* an employee of a subcontractor hired by NASA to perform construction and installation work was killed in a construction accident. The court of appeals affirmed the district court's conclusion that the approach employed in *Bassett Furniture* v. *McReynolds,* 216 Va. 897, 224 S.E.2d 323 (1976) (*i.e.,* the *Shell Oil* approach) should be applied since NASA should be treated as a private party would be treated. The court therefore found it unnecessary to reach the question whether the Virginia Supreme Court had created different standards to analyze the status of private and public entities. *Ibid.* Its result does not conflict with the present panel's decision that the *Henderson* approach better suited the facts of this case. In any event, this Court does not sit to review alleged intra-circuit discrepancies. See *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).

"better schooled in * * * the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985); see also *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[A] challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review."). Nothing in the court of appeals' resolution of the state law question here warrants deviation from that practice.

3. Finally, petitioner claims (Pet. 25-28) that the Fourth Circuit improperly affirmed the district court's decision not to grant petitioner's motion for sanctions, costs, and attorneys' fees for alleged violations of Fed. R. Civ. P. 11 and 28 U.S.C. 1927. Motions for sanctions under Rule 11 and Section 1927 are addressed to the sound discretion of the trial court; its determination may be overturned only upon a clear showing of abuse of discretion. *Rossman* v. *State Farm Mutual Ins. Co.*, 832 F.2d 282, 290 (4th Cir. 1987); *Larouche* v. *National Broadcasting Co.*, 780 F.2d 1134, 1140 (4th Cir. 1986).

Petitioner essentially contends that the government was obligated to save him his discovery costs by presenting its summary judgment motion predicated on the Virginia Workers' Compensation Act before any other defense and before filing an answer. Rule 11 is not relevant to this contention. It applies instead to pleadings and other filings and requires, *inter alia*, that arguments be advanced in the good faith belief that they are supported by "existing law," and not for harassment or "unnecessary delay or needless increase in the cost of litigation." The rule was clearly not violated here, since the district court recognized the merit in the government's argument by granting its motion to dismiss for lack of jurisdiction.

Nor did the district court find any evidence in the record that government counsel violated 28 U.S.C. 1927 by "multipl[ying] the proceedings in [this] * * * case unreasonably

and vexatiously." 28 U.S.C. 1927; see 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2670 at 225-226 (1983) ("Of course, costs will not be assessed if the court does not find truly vexatious conduct * * *."). The government asserted from the outset of the litigation that petitioner's claims were barred as a jurisdictional matter. The FTCA discretionary function and independent contractor exceptions were raised before any depositions were taken and in response to petitioner's motion for partial summary judgment on the issue of negligence. See Deft. Opp. to Pltf. Mot. for Summary Judgment on Causation, C.A. App. 946-955. The government's motion for reconsideration of the district court's denial of these jurisdictional defenses was still pending when it added the statutory employer defense. Petitioner's fact-bound claim that the district court abused its discretion in declining to impose sanctions on counsel under these circumstances has been reviewed by the court of appeals and found without merit.[7] No further review is warranted.

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[7] Petitioner charges (Pet. 25) that counsel knew of the defense because a letter to Cassutt's lawyer from the Air Force identified Cassutt as a statutory employee of the Air Force. See Pet. App. 22a. The government explained to the district court that the letter was not transmitted to the Department of Justice until May 22, 1987 (see Deft. Opp. to Pltf. Mot. for Sanctions, C.A. App. 2139); the district court found no reason to think that government counsel delayed use of the defense after concluding that it was viable. In fact, petitioner could have brought the matter to the court's attention as a Rule 12(f) motion to strike an insufficient defense, but instead actually initiated exhaustive discovery, filing voluminous requests for admission, and extensive requests for production and interrogatories. See Deft. Opp. to Pltf. Mot. for Sanctions, C.A. App. 2128-2150, for a detailed statement of events during the discovery period.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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